

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

_____)	
T-Peg, Inc. and Timberpeg East, Inc.)	
)	
Plaintiffs,)	
)	
v.)	No. C-03-462-M
)	
Stanley J. Isbitski and Vermont Timber Works, Inc.)	
)	
Defendants.)	
_____)	

**OBJECTION TO DEFENDANT VERMONT TIMBER WORKS’
SECOND MOTION TO COMPEL AND FOR SANCTIONS**

NOW COME, the Plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully object to the defendant’s, Vermont Timber Works, Inc. (“VTW”), second motion to compel and for sanctions. In support of its objection, Timberpeg states as follows:

Preliminary Statement

This action involves, principally, a claim of copyright infringement by Timberpeg that VTW unlawfully used Timberpeg's copyrighted architectural plans in the drawing and erection of a timber frame for Stanley J. Isbitski. This immediate motion involves VTW's discovery requests for documents VTW believes would cast light on Timberpeg's lost profits damages claim. The central problem with the motion is that Timberpeg has elected to forgo a claim for lost profits. Timberpeg timely made its election under governing copyright law.

The discovery VTW asks this Court to compel, therefore, does not bear on any claim remaining in this action.

VTW also asks this Court to impose sanctions for what VTW characterizes as gamesmanship. Not only does VTW present this Court with an incomplete recitation of the relevant facts, but the document on which VTW principally relies, Exhibit 5 to VTW's motion, has been altered from the original and contains language confirming that VTW's discovery efforts are designed as much to harass as to advance any defense to the claims. VTW's use of this altered document as if it were the original belies a level of candor and manner of dealing that this Court should not countenance and fatally undermines VTW's claim of entitlement to sanctions.

Factual Background

1. Through a combination of argument and incomplete recitation, VTW bases its motion on a subset of the full factual background. At the outset of the litigation, Timberpeg asserted lost profits. In its mandatory disclosures pursuant to Rule 26(a) of the Federal Rules of Civil Procedure, Timberpeg disclosed its calculation of lost profits. Timberpeg also produced 459 documents, labeled TIM00001 through TIM000459. In its mandatory disclosures, Timberpeg made the early decision simply to try to produce all of its Isbitski project documents rather than to sift among them to pull out those Timberpeg would not likely utilize at trial, as Rule 26(a) contemplates. Among the documents disclosed, were numerous documents, (TIM 000114-000121, 000131-000135, 000152-000154, 000160-000166, 000222-000282, 000331-000338, among others) that reflected both Timberpeg's pricing and costing of the Isbitski project, time spent on design, and

expense reports, all of which bear directly upon the calculation of Timberpeg's lost profits.

2. Timberpeg calculated its lost profits on the Isbitski sale by multiplying the project price by Timberpeg's gross profit margin. The gross profit margin was estimated by senior management at Timberpeg, based on their assessment of the margin Timberpeg enjoyed for projects delivered in the same approximate three month time frame in which Timberpeg expected to deliver the Isbitski project.¹ The gross profit margin does not exist in one or a series of documents relating to Isbitski. The gross profit margin is as much a function of the experience of Timberpeg as it is quantified in any particular document.² Timberpeg also produced a privilege log (which VTW has never challenged, nor which VTW has ever produced in its own right), which reflected one additional document prepared for Timberpeg's attorney, which concerned lost profits.

3. VTW made no comment, nor asked for any follow-up to Timberpeg's mandatory disclosures. Instead, VTW, without any advance communication, noticed five different depositions and included a 13 category document request with the notice. In an effort to accommodate VTW's desire to begin depositions, Timberpeg responded to the document request with a full production of numerous additional documents. To date, Timberpeg has produced over 1000 documents, while VTW has produced 178.

4. Among the deponents VTW noticed was Bob Britton, President of Timberpeg East, Inc., who has some knowledge (though is not Timberpeg's corporate designee) concerning Timberpeg's profits. Mr. Britton was available and expected to be

¹ VTW incorrectly asserts a 13 month time period in its motion at p.3.

² In this regard, Timberpeg's practices appear to differ from VTW's, the latter maintaining so-called job cost master sheets for each project that reflect profit margins for that project.

deposed, but, at the last minute, Attorney Whittington decided not to take Mr. Britton's deposition.

5. VTW then propounded a series of interrogatories, requests for admission and requests for production of documents. Timberpeg responded with an additional production and a privilege log. With respect to Interrogatory 17, at issue in this Motion, Timberpeg provided the calculation it thought VTW sought. Interrogatory 17 expressly sought "all" documents that in any way related to the calculation. As mentioned, Timberpeg had already produced Isbitski project cost and pricing documents. In the absence of any further clarification as to what documents VTW sought, Timberpeg did not produce more documents relating to Interrogatory 17.

6. On June 11, 2004, Attorney Whittington transmitted the email attached as Exhibit 4 to VTW's motion, raising, for the first time, a variety of complaints about Timberpeg's discovery responses. That email resulted in a lengthy, telephonic "meet and confer," one of the only times, other than the Rule 16 Planning Conference, that counsel for the parties have communicated directly by telephone. With respect to Interrogatory 17, Attorney Whittington made it clear that he sought a more detailed explanation of the calculation. At no time did Attorney Whittington complain about Timberpeg's document production with respect to Interrogatory 17, or request additional documents by more descriptive categories. Attorney Whittington's own memo to file purporting to memorialize the conversation, attached as Exhibit 5 to VTW's motion omits any mention of additional documents.

7. The memo to file attached as Exhibit 5 raises a troubling issue that undermines VTW's motion as well as the forthrightness of Attorney Whittington's

representations to this Court. Attached as Exhibit A hereto is the copy of the memo Attorney Whittington actually transmitted to Timberpeg's counsel, which differs from the copy attached as Exhibit 5 to VTW's motion.³ A comparison of the note concerning Interrogatory 17 on both copies, for example, reveals the absence of a note in the original as to gross profit margin on the timberframe alone, which reference has apparently been added to the version Attorney Whittington has provided to this Court. Compare Exhibit A with VTW Exhibit 5.

8. Equally troubling in the version attached as Exhibit 5 to VTW's motion, is a reference to the real purpose of Interrogatories 11 and 12, which states "I am not really sure why you want the info, other than to make them work, which is a good thing." VTW Motion, Ex. 5. This undermines not only the relief requested in VTW's motion and the credibility of VTW's allegations in support of that request, but also strongly suggests that VTW's discovery strategy generally is not designed as much to seek admissible evidence as to harass, and make Timberpeg "work" for no reason except to increase costs and resource consumption to no legitimate end. As discussed in greater detail below, both the facts that Attorney Whittington would present a subsequently modified document to this Court as "proof" of a factual event, and that VTW's discovery efforts are aimed at ends other than preparation of VTW's case, is an ominous development in this litigation.

9. The meet and confer occurred on or about June 19. On June 21, counsel for Timberpeg began a jury trial in the Merrimack County Superior Court (Franklin Industrial Complex, et al v. Algonquin Power Corporation, et al, No 99-E-0383 and

³ The memo was attached to an email which the undersigned did not print until October 26, 2004. The date in the memo is October 26, 2004, and adjusted automatically when counsel opened the memo to print it. Counsel assumes the memo contains a self-updating date code.

0386). Counsel advised Attorney Whittington of that trial, which was expected to consume two to three weeks of trial time, and also that Timberpeg could not supplement prior to July 9 at the earliest. See June 13 email from Attorney Will to Attorney Whittington, attached as Exhibit B. Counsel for Timberpeg did not ask Attorney Whittington to refrain from filing a motion; to the contrary, counsel informed Attorney Whittington that he would not be able to either supplement discovery responses or object to a motion prior to July 9. See June 16 email from Attorney Will to Attorney Whittington, attached as Exhibit C.

10. The Merrimack County trial ended late in the day on June 30, 2004, through an unexpected settlement. Counsel for Timberpeg acknowledges taking July 1 and 2 off, and not returning to the office until July 6, after the July 4 holiday. Shortly thereafter, on July 13, Timberpeg provided supplemental answers, including to Interrogatory 17, to VTW. The month "delay" emphasized in VTW's motion, in other words, occurred because of Timberpeg's counsel's Merrimack County trial, of which Attorney Whittington was informed. Notably, Attorney Whittington was on an extended vacation out of the country during this period, during which he presumably was working on this litigation.

11. Contrary to the text of the altered memorandum attached as Exhibit 5 to VTW's motion, in an email dated July 13, Attorney Whittington asked, for the first time, for additional discovery in the form of a breakout of certain costs/profits relating to framing alone, as part of Interrogatory 17. That request had not been part of the June 19 meet and confer, as the actual copy of Attorney Whittington's notes sent to Attorney Will confirms. See Exhibit A. Any suggestion by Attorney Whittington to the contrary, based

on the version of his notes attached as Exhibit 5 to VTW's motion, is simply not true. Counsel for Timberpeg told Attorney Whittington this was the first he was aware of that specific request, but that he would accommodate it.⁴ See July 13 email from Attorney Will to Attorney Whittington, attached as Exhibit D.

12. Having undergone the meet and confer and supplementation and having heard nothing, Timberpeg thought that Attorney Whittington was satisfied with the state of the paper discovery. See August 12 email from Attorney Will to Attorney Whittington, attached as Exhibit E. Timberpeg heard nothing from VTW with respect to discovery until a month later, on August 12, when Attorney Whittington sent a heated email to counsel for Timberpeg, portraying the story much as VTW has in the immediate motion, and asserting for the first time that Timberpeg's Rule 26(a) disclosures were inadequate. Included in that email, for the first time, was a series of extremely broad, additional discovery requests, including entire years' worth of information concerning all of Timberpeg's various operating companies' projects,⁵ as well as all documents reflecting "overhead" among others. Simultaneously, VTW propounded two additional document requests for tax returns and financial statements. Counsel for Timberpeg informed Attorney Whittington that he was scheduled to be away on vacation beginning August 16, and would not have time to discuss the new requests with his client and prepare a meaningful response prior to his vacation. See August 12 email from Attorney Will to Attorney Whittington, attached as Exhibit E.

⁴ Timberpeg's counsel agreed to accommodate that request after assuming that it could be done. In fact, Timberpeg's counsel was mistaken – such a breakout cannot be readily performed, because Timberpeg does not account for its projects in that fashion.

⁵ Timberpeg is a trade name under which a number of regional operating companies design and manufacture post and beam home packages. Timberpeg's corporate structure is detailed in the affidavit of Brian Pattison, submitted to this Court in Timberpeg's summary judgment appendix.

13. Counsel for Timberpeg did not ask Attorney Whittington to forebear from filing a motion to compel. To the contrary, Counsel informed Attorney Whittington that he could not respond to the discovery demands or the expert extension request prior to his vacation, and asked only that if Attorney Whittington felt it necessary to file a motion, that he inform this Court of Timberpeg's counsel's absence and assent to an extra five days in which to respond to any motion. See id.; see also August 13 email from Attorney Will to Attorney Whittington, attached as Exhibit F.

14. Attorney Whittington chose not to file a motion to compel in Timberpeg's counsel's absence, and instead filed a motion for summary judgment on all claims on August 16, the first day of Timberpeg's counsel's vacation, and nearly two and a half months in advance of the summary judgment deadline. During the week of August 22, counsel for Timberpeg agreed to extend VTW's expert disclosure deadline by 35 days from the date of Timberpeg's substantive response to Attorney Whittington's August 12 email, in order to allow Timberpeg to focus on the pending summary judgment motion. VTW did not offer to extend Timberpeg's summary judgment objection deadline by the week Attorney Whittington knew Timberpeg's counsel had lost in response time due to his vacation. It bears noting that even though VTW's complaints focused on damages discovery, Timberpeg extended the expert deadline generally, allowing VTW additional time to disclose a liability expert as well as a damages expert.

15. Shortly thereafter, Attorney Whittington began to express frustration with the agreement he made concerning his expert disclosure deadline and to demand the damages discovery. During this same time period, Timberpeg was evaluating the onslaught of new discovery requests from VTW, some of which sought information that

is not compiled in one place or on one document and which would be extremely time consuming to compile, coupled with the costs of either litigating the scope of the requests or the costs of production in light of Timberpeg's overall goals in the litigation and the panoply of remedies available to a copyright infringement plaintiff. Inasmuch as lost profits threatened to become a sideshow that could eclipse Timberpeg's central goal of the litigation – protection of its intellectual property -- Timberpeg explored with Attorney Whittington whether VTW would be interested in bifurcating the trial into liability and damages phases, a concept Attorney Whittington had raised in connection with his reluctance to produce VTW damages discovery. When VTW rejected that possibility, Timberpeg elected to forgo lost profits damages and seek either disgorgement of VTW's profits or statutory damages under the Copyright Act. Timberpeg communicated that determination to Attorney Whittington, in a letter attached to VTW's motion as Exhibit 17.

Argument

I. The Motion To Compel Should Be Denied

16. The Copyright Act allows plaintiffs to recover their own actual damages, generally lost profits, as well as disgorgement of the infringer's profits. See 17 U.S.C. § 504. Alternatively, copyright plaintiffs may seek an award of statutory damages. See id. Copyright plaintiffs may make their damages election at any time prior to the entry of judgment. See id. Not only may Timberpeg elect at any time to forgo its lost profits and focus entirely on disgorgement of VTW's profits, see, e.g., Business Trends Analysts v. Fredonia Group, Inc., 700 F. Supp. 1213, 1237 (S.D.N.Y. 1988), aff'd, 887 F.2d 399 (2d Cir. 1989) (allowing disgorgement of defendant's profits despite plaintiff's lack of proof

of actual damages), but it may, alternatively, elect statutory damages with no evidence of actual damages. See, e.g., Harris v. Emus Records Corp., 734 F.2d 1329, 1335 (9th Cir. 1984) (approving election of statutory damages in absence of proof of actual damages). Timberpeg may make its election at anytime during the litigation. See 17 U.S.C. § 504.

17. Timberpeg having elected to forgo its lost profits and seek either disgorgement of VTW's profits or statutory damages, the discovery VTW seeks cannot be viewed as reasonably calculated to lead to the discovery of admissible evidence because it bears on no claim at issue in this litigation. Despite Timberpeg's position, VTW has moved to compel this information. The only resulting contingency is that Timberpeg has informed VTW that if, through VTW's motion, Timberpeg is compelled to produce the discovery, Timberpeg will then seek its lost profits as damages. At present, however, Timberpeg's lost profits are not an issue in this action, and they will not be an issue unless or until this Court orders production of the discovery VTW seeks to compel.

18. Given that Timberpeg's lost profits are not presently at issue, the relevance of the discovery VTW seeks is nonexistent. VTW's only relevance argument is that the requested discovery will somehow explain to its own profits. VTW fails to offer any statutory, decisional or treatise authority for this argument, nor is Timberpeg aware of any such authority for VTW's novel proposition. Reduced to its core, VTW argues that evidence concerning Timberpeg's lost profits will help prove up VTW's actual profits.

19. In addition, the discovery VTW seeks is not relevant to any of Timberpeg's state law claims, all of which, as pointed out in Timberpeg's objection to VTW's Rule 12(c) motion, allow for disgorgement of the defendant's profits or statutory relief.

20. The lack of any relevance to the claims in this action of the discovery VTW seeks may belie a less forthright purpose to VTW's motion. The comments contained in Exhibit 5 to VTW's motion, which appear to enshrine a strategy of seeking irrelevant discovery so as to harass Timberpeg, further taint VTW's contention that the discovery it seeks somehow bears on any claims in this litigation.

21. In any event, rather than force the production of irrelevant documentation, likely after additional litigation as to the overbreadth of the requests, Timberpeg requests that this Court focus the parties on remaining discovery concerning issues actually in dispute and ask them to refrain from unnecessary letter writing campaigns setting up equally unnecessary motion practice.

II. The Motion For Sanctions Should Be Denied

22. Stripped of the vituperative rhetoric which has become emblematic of VTW's pleadings and correspondence in this action, VTW's motion offers this Court no basis to award sanctions of any kind against Timberpeg. Not only does the record demonstrate VTW's gamesmanship and not Timberpeg's, but Timberpeg has neither violated Rule 26 nor 37. Pared to its essence, VTW asks this Court to sanction Timberpeg for making an election concerning damages that governing law allows Timberpeg to make at any time up to the entry of judgment.

23. VTW contends that Timberpeg's Rule 26(a) disclosures required it to produce the entire, tremendous breadth of discovery VTW only got around to requesting

on August 16. As mentioned, Timberpeg did produce documents bearing on its lost profits, which VTW appears to have overlooked altogether. Indeed, Timberpeg produced virtually every document in its possession relating to the Isbitski project. To date, Timberpeg has produced over 1,000 documents, compared to VTW's 178. As the advisory committee notes make clear, Rule 26(a) requires production of documents the disclosing party may rely on at the time of trial. See Fed. R. Civ. P. 26 (advisory committee notes). Rather than take a narrow view of Rule 26, in its disclosures, Timberpeg produced nearly 500 documents, essentially everything it possessed pertaining to the Isbitski project, including pricing and costing documents. For VTW to contend that Timberpeg failed to disclose some portion of Rule 26(a) documents is confounding.

24. The facts, moreover, neither demonstrate delay nor any effort on Timberpeg's part to encourage VTW to hold off on a motion to compel. In questioning the "delay" between the June meet and confer and Timberpeg's July discovery supplementations, VTW omits to point out Timberpeg's counsel's Merrimack County trial, of which Attorney Whittington was told, which occupied the balance of the month of June. VTW would rather leave this Court with the impression that Timberpeg is unresponsive. Similarly, questioning the "delay" between the August 16 email first asserting new damages discovery requests and the September response, VTW omits to point out Timberpeg's counsel's vacation and VTW's motion for summary judgment filed the first day of that vacation and two and a half months prior to the summary judgment deadline. VTW also underplays its own agreement with Timberpeg for an extension of its expert disclosure.

25. Attorney Whittington's claim of gamesmanship on the part of Timberpeg or its counsel is not well taken. It is Attorney Whittington who has provided this Court with a modified version of his notes of the June meet and confer to buttress his false argument that Timberpeg delayed or was unresponsive. That same document, Exhibit 5 to VTW's motion, confirms VTW's strategy of seeking unnecessary discovery "to make them work, which is a good thing." Motion at Ex. 5. VTW's effort to cast the facts as sanctionable and to accuse Timberpeg of gamesmanship are bold in the extreme, particularly when based on falsified documents and a harassment strategy.

26. In the absence of a claim for lost profits, VTW can offer no legitimate purpose behind its efforts to obtain lost profits discovery. VTW demonstrates neither a basis for an order compelling discovery nor for sanctions. VTW does demonstrate a need for an order from this Court compelling the parties to focus on the issues in the case and the discovery necessary to prepare this case for trial.⁶ VTW also owes this Court and Timberpeg an explanation for the comments contained in and its use of the altered document attached as Exhibit 5 to VTW's motion.

28. Due to the authorities and argument cited herein, no accompanying memorandum of law is necessary.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Deny the Defendant's Motion To Compel;
- B. Deny the Defendant's request for sanctions; and
- C. Grant such further and other relief as this Court deems just, equitable and proper.

⁶ This is the first of two ill presented sanctions motions filed by VTW against Timberpeg.

Respectfully submitted,

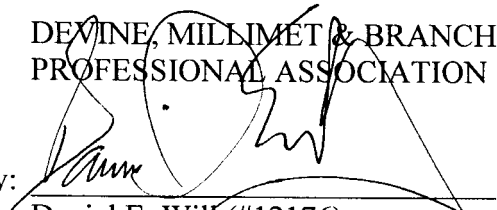
T-PEG, INC. AND TIMBERPEG
EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: October 29, 2004

By:



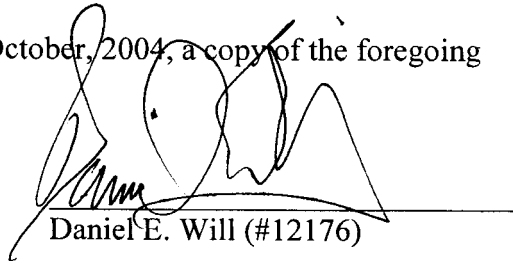
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.



Daniel E. Will (#12176)